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Religious Landmark Preservation Under the First and Fifth Amendments: St. Bartholomew's Church v. City of New York

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RELIGIOUS LANDMARK PRESERVATION UNDER THE FIRST AND FIFTH AMENDMENTS: *ST. BARTHOLOMEW'S CHURCH v. CITY OF NEW YORK*

INTRODUCTION

In recent years, the practice of landmarking religious institutions has come under careful scrutiny due to concerns[1] that landmark statutes[2] may infringe upon two important constitutional rights: the right to the free exercise of religion[3] and the right to be compensated for government takings.[4] Nonetheless, while the constitutional ramifications of such statutes have been the subject of much commentary,[5] the United States Supreme Court has not specifically addressed the constitutionality of landmarking of religious structures.[6] The Court has, however, provided some insight in this area through its analysis of disputes concerning the free exercise clause[7] and of claims arising under the takings clause stem-

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[1] *See* Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562, 1562-63 (1984). State courts have been unable to agree on the effect that the free exercise clause has on state regulation of land use. *See id.* at 1562. In New York, an "interdenominational group of churches" has challenged New York City's landmark preservation statute as "a violation of the burden on free exercise clause." *Id.* at 1563.

[2] *See, e.g.*, NEW YORK, N.Y., ADMIN. CODE ch. 3, §§ 25-305 to 25-321 (1986) (New York Landmarks Preservation and Historic Districts Law).

[3] *See* U.S. CONST. amend. I. The first amendment states, in pertinent part: "Congress shall make no law . . . prohibiting the free exercise [of religion]." *Id.*

[4] U.S. CONST. amend. V. "[P]rivate property [shall not] be taken for public use without just compensation." *Id.*

[5] *See* Crewdson, *Ministry and Mortar: Historic Preservation and the First Amendment After* Barwick, 33 WASH. U.J. URB. & CONTEMP. L. 137, 139-45 (1988). While several states have established rules of preference for churches in land use cases, generally state and federal courts do not afford any special status solely on the basis of religious affiliation. *Id.*; *see* Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CALIF. L. REV. 1301, 1304 (1989).

[6] *See infra* notes 49 & 72-73 and accompanying text.

[7] *See, e.g.*, Employment Div. v. Smith, 110 S. Ct. 1595, 1600 (1990) (free exercise clause does not prohibit application of Oregon drug law to Native Americans concerning religious ceremonial ingestion of peyote); Hernandez v. Commissioner, 490 U.S. 680, 695-96 (1989) (Internal Revenue Code governing charitable deductions does not violate of free exercise clause); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (denial of unemployment benefits to Seventh-Day Adventist whose religion precluded working on Saturday violates free exercise clause).

ming from land use regulation.[8]

Recently, in *St. Bartholomew's Church v. City of New York*,[9] the United States Court of Appeals for the Second Circuit upheld the constitutionality of landmark statutes with respect to religious organizations by finding the New York Landmark Preservation statute[10] to be constitutional as applied to St. Bartholomew's Church on both first and fifth amendment grounds.[11] In *St. Bartholomew's*, a controversy arose following the New York Landmark Preservation Commission's[12] 1967 landmarking of the St. Bartholomew Protestant Episcopal Church and its adjacent Community House.[13] Under the New York statute, such a designation is significant because it requires continual maintenance of any designated structure[14] and prohibits alteration of the structure's exterior[15]

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[8] *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987) (takings clause violated where state conditioned granting of building permit on private owner granting public easement); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 481 (1987) (Court rejected takings challenge directed at state law prohibiting mining that causes substantial damage to buildings); Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980) (city zoning ordinance governing land use not facially unconstitutional).

[9] 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 59 U.S.L.W. 3433 (March 4, 1991).

[10] NEW YORK, N.Y., ADMIN. CODE ch. 3, §§ 25-301 to 25-321 (1986). The public policy underlying New York's Landmark Preservation statute is to promote the "protection, enhancement, perpetuation and use of improvements of landscape features of special character or special historical or aesthetic interest or value." *Id.* § 25-301(b). Such protections were declared by the legislature to be a "public necessity and . . . required in the interest of . . . the health, prosperity, safety and welfare of the people." *Id.*

[11] *See St. Bartholomew's*, 914 F.2d at 350.

[12] *Id.* at 351. The Commission is required by law to be made up of at least three architects, one historian, one city planner or landscape architect, and at least one resident from all five New York City boroughs. *See* Penn Central Co. v. City of New York, 438 U.S. 104, 110 n.8 (1978).

[13] *See St. Bartholomew's*, 914 F.2d at 351. The Church building is located on the east side of Park Avenue between 50th and 51st Streets in Manhattan. *Id.* Adjacent to the Church building, at the northeast corner of Park Avenue and 50th Street, is the Community House. *Id.* The Community House is a terraced, seven-story building used by the Church to hold a variety of social and religious activities. *Id.* The building contains a sixty-student preschool, a large theater, athletic facilities, meeting rooms and offices. *Id.* Additionally, meals are prepared in the Community House for the homeless pursuant to a community ministry program operated by the Church. *Id.*

In designating the Church and Community House as landmarks, the Commission described them as possessing a "special historical and aesthetic interest and value as part of the development, heritage and cultural aspects of New York City." *Id.*

[14] *See* NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-305 (1986). All persons in charge of a designated landmark site must keep in good repair all exterior portions as well as any interior portions which, if not maintained will effect the exterior portions. *Id.* § 25-311(a).

[15] *See id.* § 25-305. Section 25-305(a)(1) provides: "[I]t shall be unlawful for any person in charge of a landmark site . . . to alter, reconstruct or demolish . . . a part of such site . . . or to construct any improvement upon land embraced within such site." *Id.*

without the consent of the Landmark Commission.[16] Although St. Bartholomew's Church was in full compliance with the statute's maintenance requirements, the Commission denied the Church permission to demolish its Community House and to erect a forty-seven story office tower in its place.[17] Citing a need to construct the tower for the purpose of increasing revenue for necessary church activities,[18] St. Bartholomew's Church challenged this denial on the grounds of free exercise and government taking.[19]

This Note will examine the Second Circuit's decision in *St. Bartholomew's* and assert that the court was correct in holding that the landmark statute was constitutional on both first and fifth amendment grounds. Part One will discuss the various analyses applied by the Supreme Court in resolving free exercise challenges. Part Two will outline the Supreme Court's interpretation of the fifth amendment takings clause in the area of land use regulation. Finally, Part Three will examine the Second Circuit's analysis in *St. Bartholomew's* and suggest that based on Supreme Court precedent, the *St. Bartholomew's* court was correct in upholding the validity of the New York Landmark Preservation statute as applied to St. Bartholomew's Church.

I. Free Exercise of Religion Under the First Amendment

In construing the free exercise clause of the first amendment,[20] the United States Supreme Court has recognized that "the freedom to act, unlike the freedom to believe, cannot be absolute."[21]

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[16] *See id.* § 25-306. An owner desiring to construct, reconstruct, alter or demolish any part of a landmarked building must first request permission from the Commission by filing an application together with a request for a "certificate of no effect on protected architectural features." *Id.* § 25-306(a)(1). The Commission must then issue its decision within thirty days. *Id.* § 25-306(a)(2). The Commission has wide discretion in the exercise of its powers. *Id.* § 25-304.

[17] *See* St. Bartholomew's Church v. City of New York, 728 F. Supp. 958, 961 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990).

[18] *See* Brief for Appellant at 2-3, St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) (Nos. 88-7751, 90-7101) [hereinafter Brief for Appellant]. St. Bartholomew's contended that "the new building would provide space for various church activities" and "generate income . . . essential to support [the Church's] mission to repair and rehabilitate the church building and . . . assure the survival of the Church." *Id.*

[19] *See St. Bartholomew's*, 914 F.2d at 350.

[20] The free exercise clause of the first amendment applies to the states through the fourteenth amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). In *Cantwell*, the Court held that the "fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Id.*

[21] Employment Div. v. Smith, 110 S. Ct. 1595, 1608 (1990). The *Smith* Court cited

However, the Court has noted that this right, though not absolute,[22] is given a "preferred position."[23] Recent Supreme Court decisions provide an analytical framework for establishing the scope of the rights protected by this "preferred position."[24] In *Braunfeld v. Brown*,[25] while examining a free exercise challenge of a Pennsylvania statute which proscribed the Sunday retail sale of certain enumerated commodities brought by Orthodox Jewish merchants,[26] the Court adopted a balancing test that weighed the government's secular goal in regulating religious conduct against the indirect burden such regulation placed upon the free exercise of religion. In addition, this test considered whether the government could accomplish its purpose by less burdensome means.[27] In

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Reynolds v. United States, 98 U.S. 145, 161-67 (1878), where the Court, in upholding a conviction for polygamy, stated: "laws are made for the government of actions and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166.

[22] *See Cantwell*, 310 U.S. at 303. In *Cantwell*, the Court described the exercise of religion as consisting of both the freedom to believe and the freedom to act and stated that "[t]he first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to the regulation for the protection of society." *Id* at 303-04.

[23] Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). In *Murdock*, the Court determined that a municipal ordinance that required Jehovah Witnesses to pay a tax to distribute literature and solicit donations for books and pamphlets was unconstitutional as applied. *Id.* at 106-07. The Court reached this conclusion by finding that the ordinance violated three first amendment freedoms: speech, press, and religion. *Id.* at 113-15. In addressing the contention that the statute treated all who came within its measure equally, the Court observed that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." *Id.* at 115.

[24] *See infra* notes 25-69 and accompanying text.

[25] 366 U.S. 599 (1961).

[26] *Id.* at 601. In *Braunfeld*, Orthodox Jewish merchants challenged a Pennsylvania "Sunday closing" law on the ground that their religion required them to close their businesses on Saturdays, and that a mandatory Sunday closing requirement would seriously impair their ability to earn a living. *Id.* They contended that the burden placed on them by this law violated their religious free exercise right. *Id.* at 602. The Court, however, upheld the constitutionality of the law, reasoning that Pennsylvania had a legitimate state interest in requiring a general day of rest. *Id.* at 608. The Court further determined that permitting the plaintiffs to remain open on Sunday would enable them to gain an economic advantage over their competition. *Id.* at 608-09. Thus, the Court reasoned that a ruling in favor of the merchants could result in persons asserting their religious convictions merely to keep their businesses open on Sunday and close them on what had previously been their least profitable day. *Id.* at 609. Such a result, the Court noted, "might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees." *Id.*

[27] *See id.* at 607. The *Braunfeld* Court stated:

> [I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is

a later case, *School District of Abington Township v. Schempp*, [28] the Court honed its free exercise analysis by requiring that the contending party prove "the coercive effect of the enactment as it operates against him in the practice of his religion."[29] The Court further refined its free exercise analysis in *Sherbert v. Verner*,[30] when it addressed an issue concerning the refusal of South Carolina's Employment Security Commission to award unemployment benefits to the plaintiff based on her refusal to work on Saturdays.[31] The plaintiff, a member of the Seventh-Day Adventist Church, was prohibited from working on Saturday pursuant to her religious beliefs.[32] In challenging the Commission's position, the plaintiff contended that she was being deprived of her right to free exercise of her religion.[33] Upon examination of her claim, the Court concluded that the Commission's ruling was unconstitutional on free exercise grounds,[34] reasoning that government action found to substantially infringe upon the free exercise of religion[35] must be

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valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id.

The Court also noted that if the purpose or effect of the law is to discriminate between religions or impede the observance of religious beliefs, then even an indirect burden would render the law unconstitutional. *Id.*

[28] 374 U.S. 203, 225-26 (1963). In *Schempp*, the Court struck down a Pennslyvania statute requiring Bible reading in public schools, reasoning that the government must remain neutral with respect to religious beliefs and exercises, and that "[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality." *Id.* at 226.

[29] *Id.* at 223. The *Schempp* Court noted that the purpose of the free exercise clause is to "secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Id.* Therefore, for a constitutional violation to exist, it is necessary to show that the coercive effect of the regulation hinders the practice of the individual religion in question. *Id.*

[30] 374 U.S. 398 (1963).

[31] *Id.* at 401. In *Sherbert*, the Commission found that the claimant's refusal to work on Saturday disqualified her from receiving unemployment benefits because she had failed, without good cause, to accept "suitable work when offered." *Id.*

[32] *Id.* at 399 n.1. There was no dispute that the basic tenet of Seventh-Day Adventists is prohibition of work on Saturdays. *Id.*

[33] *Id.* at 400.

[34] *Id.* at 409-10.

[35] *See id.* at 403-04. The Court commenced its analysis by examining whether the statute at issue imposed a substantial burden on the plaintiff's right to exercise her religion freely. *Id.* at 403. The Court concluded that there was an unconstitutional burden imposed on the plaintiff since the Commission's ruling forced her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

supported by a compelling governmental interest.[36] Furthermore, the Court noted that the regulation must constitute the least restrictive means of achieving the proposed governmental objective.[37]

In *Wisconsin v. Yoder*,[38] the Court was presented with the opportunity to apply its recently developed free exercise balancing test.[39] In *Yoder*, the Court determined that Wisconsin's refusal to exempt fourteen and fifteen-year-old Amish students from a statewide compulsory school attendance law, which required attendance until the age of sixteen, was invalid on free exercise grounds.[40] In applying its balancing test, the Court held that despite the "high responsibility"[41] Wisconsin has in the formal education of it citizens,[42] the state's infringement on the claimants' religious beliefs was overly burdensome and unjustifiable.[43] In arriving at its conclusion, the Court realized that the judiciary must be flexible in its review of religious freedoms and should explore alternative regulatory means that could satisfy its interests without hindering the practice of religion.[44] The Court further noted that the Amish had convincingly demonstrated the sincerity of their religious beliefs,[45]

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[36] *Id.* at 403. After finding that the South Carolina statute substantially infringed upon the plaintiff's free exercise rights, the Court shifted its analysis to consider whether there was a "compelling state interest." *Id.* at 406-09.

[37] *Id.* at 407. The Court stated that even if there is a legitimate finding of a compelling state interest, it is still "incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.*

[38] 406 U.S. 205 (1972).

[39] *See supra* notes 27-29, 35-37 and accompanying text (discussing balancing test adopted by Court).

[40] *Yoder*, 406 U.S. at 234.

[41] *Id.* at 213.

[42] *Id.* The Court commented that the state has a "high" responsibility in providing a public education for its citizens for this "ranks at the very apex of the function of a State." *Id.*

[43] *Id.* at 215-34. The Court stated that only interests of "the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Id.* at 215. The Court then noted that although a state's interest in compulsory education is strong, it is "by no means absolute to the exclusion or subordination of all other interests." *Id.*

[44] *Id.* at 235. The Court noted that "courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements." *Id.*

[45] *Id.* at 210-17, 235. The Amish believe that "salvation requires life in a church community separate and apart from the world and worldly influence." *Id.* at 210. In reaching its decision, the *Yoder* Court relied on the fact that the Amish have a history as a self-sufficient religious sect. *Id.* at 235. The Court recognized that the traditional life of the Amish is not only a matter of choice, but one of "deep religious conviction, shared by an organized group,

that these beliefs played a vital role in their daily conduct[46] and that they significantly affected the survival of the Amish community.[47] Also instrumental in the Court's decision was the ability of the Amish to demonstrate that their informal mode of vocational education effectively achieved Wisconsin's "compelling interest" in compulsory education.[48]

In applying the free exercise analysis developed by the Supreme Court as refined in *Sherbert*,[49] most courts agree that a regulation that merely diminishes the amount of revenue that a religious organization would otherwise have available for religious purposes is not viewed as a substantial burden on the free exercise of religion.[50] This position suggests that any religiously neutral law

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and intimately related to daily living," which regulates and directes every aspect of their lives. *Id.* at 216.

[46] *Id.* at 210-35. The Amish object to formal education beyond the eighth grade because they believe that while a certain level of education is necessary, additional public education exposes their children to influences which contrast with Amish values. *Id.* Specifically, they believe that the increased emphasis on competition and peer pressure from non-Amish children would affect the Amish child during his most formative years, and these years are crucial to the Amish if they are to survive as a sect. *Id.*

[47] *Id.* The Court concluded that the Amish were able to prove "the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities." *Id.* at 235.

[48] *Id.* at 221, 234. In *Yoder*, the compelling interest in compulsory education asserted by the state was based on the belief that some degree of education is necessary to prepare citizens to participate intelligently in the political system, and to allow them to remain economically self-sufficient. *Id.* at 221. However, the Court found that allowing the Amish to forego two years of compulsory education would not impair this compelling state interest. *Id.* at 234. This determination was supported by the fact that the Amish demonstrated the adequacy of their alternative lifestyle of informal education in achieving "precisely those overall interests that the State advances in support of its program of compulsory high school education." *Id.* at 235.

[49] *See* Comment, *First Amendment Challenges to Landmark Preservation Statutes*, 11 FORDHAM URB. L.J. 115, 132-37 (1982). One commentator suggests that the *Sherbert* balancing test should be used to resolve free exercise of religion controversies arising from the application of landmark preservation statutes to religious institutions. *See id.* at 134-35. However, the Supreme Court's decision in Employment Div. v. Smith, 110 S. Ct. 1595 (1990), apparently narrowed the reach of the *Sherbert* balancing test. *See infra* notes 61-64 and accompanying text.

[50] *See* Jimmy Swaggart v. Board of Equalization, 110 S. Ct. 688, 696 (1990). In *Swaggart*, the Jimmy Swaggart Ministry contended that their free exercise rights had been violated due to a general tax law on the retail sale of personal property. *Id.* at 693. The Ministry, which sold religious books, tapes, and magazines, claimed that this tax resulted in less revenue for religious pursuits and was in violation of their first amendment rights. *Id.* at 696. Rejecting this argument, the Court stated, "to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant." *Id.* The Court noted that the tax law in question was not different than other general laws and regulations such as those

of general application, not taken to its harsh extreme[51] and which merely reduces revenue available for religious activities, would not place a constitutionally impermissible burden on the free exercise of religion.[52] Therefore, under such a view, it would appear that a state would not be required to show a compelling state interest to support a regulation that has such an effect.[53] Consequently, if the sole burden placed on a religious organization due to a landmark statute is a decrease in potential revenue, a valid free exercise claim would not exist.

In the recent decision of *Employment Division v. Smith*,[54] the Supreme Court restricted the application of the *Sherbert* "compelling state interest" test[55] and suggested that a generally applicable religion-neutral standard be followed.[56] In *Smith*, the Court examined whether an Oregon statute criminalizing the use of peyote was constitutional as applied to Native Americans who ingested the drug as part of their religious rites.[57] In finding the statute con-

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designed to promote health or safety. *See id.* at 697; *see also* Hernandez v. Commissioner, 490 U.S. 680, 700 (1989) (denial of charitable deduction under Internal Revenue Code for religious training payments not unconstitutional); United States v. Lee, 455 U.S. 252, 260 (1982) (requirement that Amish pay Social Security tax not violative of free exercise of religion); Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307-08 (6th Cir.) (financial imposition of local ordinance on congregation held not to violate free exercise clause), *cert. denied*, 464 U.S. 815 (1983).

[51] *Swaggart*, 110 S. Ct. at 697. The *Swaggart* Court suggested that if a law is too extreme in its effect, it may be discriminatory. *Id.*; *see* Murdock v. Pennslyvania, 319 U.S. 105, 115 (1943) (burden of flat tax could have effect on evangelism "crush[ing] and clos[ing] [it] out by the sheer weight of the toll or tribute which is exacted town by town").

[52] *See Swaggart*, 110 S. Ct. at 697.

[53] *See* Record of Oral Argument on Appeal at 7-9, St. Bartholomew's v. City of New York, 914 F.2d 348 (2d Cir. 1990) (Nos. 88-7751, 90-7101) [hereinafter Record of Oral Argument on Appeal]. Judge Winter of the Second Circuit stated that when applying the compelling state interest test, the first step is to examine whether there is a substantial burden on the party's free exercise of religion. *Id.* at 7-8. Thus, a court would first resolve whether the "disqualification for benefits imposes any burden on the free exercise of . . . religion." *Sherbert*, 374 U.S. at 403. If the court concludes that a burden exists, the court must determine whether there is a compelling state interest to justify the burden imposed. *Id.* at 406.

[54] 110 S. Ct. 1595 (1990).

[55] *See infra* notes 61-64 and accompanying text.

[56] *See infra* notes 65-66 and accompanying text.

[57] *See Smith*, 110 S. Ct. at 1597-99. The respondents, Native Americans, were fired from their jobs due to their ingestion of peyote pursuant to their religion and were subsequently denied unemployment benefits due to dismissal for work-related "misconduct." *Id.* at 1598. On remand from the United States Supreme Court to determine whether such religious use was permissible within the Controlled Substance Law, the Oregon Supreme Court held that although the use of peyote was a criminal offense, the prohibition was an unconstitutional infringement on the respondent's free exercise of religion. *Id.*

stitutional,[58] the Court dismissed the respondent's free exercise claim by stating that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' "[59] Further, the Court implied that if the restriction on religious practices was not the object of a law but merely an incidental effect of a general, otherwise valid, religion-neutral provision, first amendment rights would not be violated.[60] As for the *Sherbert* "compel-

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[58] *See id.* at 1606. The Court acknowledged that many states have made an exception to their drug laws for the sacramental use of peyote, but concluded that since such use is prohibited under Oregon law, and the prohibition is not an unconstitutional violation of the free exercise of religion, the claimants' application for unemployment compensation could be denied based on a dismissal for the peyote use. *Id.*

[59] *Id.* at 1600 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)). The Court suggested that this analytical framework was consistent with prior judicial approaches to free exercise analysis. *Id.* The Court observed that it "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* However, not all of the Justices were in agreement. *See id.* at 1606-15 (O'Connor, J., concurring); *Id.* at 1615-23 (Blackmun, J., dissenting). Justice O'Connor rendered a stinging criticism of the majority's restriction of the "compelling state interest" test by remarking that the Court's approach was clearly inconsistent in light of prior precedent. *Id.* at 1612 (O'Connor, J., concurring). Justice O'Connor contended that a balancing test was necessary for, "[a]s the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity" and therefore, a law that criminalizes this activity, demands a balancing test. *Id.* (O'Connor, J., concurring). Further, Justice O'Connor analogized free exercise cases to those involving freedom of speech, where a balancing test based on individual merits, rather than a categorical "generally applicable law" rule, is applied. *Id.* (O'Connor, J., concurring). Justice O'Connor took particular exception to the majority's conclusion that "disfavoring minority religions is an 'unavoidable consequence' under our system of government and that accomodation of such religions must be left to the political process," and asserted that the first amendment was enacted particularly for the reason of protecting minority religious practices. *Id.* at 1613 (O'Connor, J., concurring). Finally, in applying the "compelling state interest" test, Justice O'Connor determined that Oregon's interest in controlling drug usage and abuse was compelling enough to uphold such a uniform rule necessary to accomplish this goal. *Id.* at 1614 (O'Connor, J., concurring).

Justice Blackmun, dissenting, voiced a particularly strong opposition to the majority viewpoint, arguing that, despite the fact that the Court had an established procedure for analyzing free exercise issues, the "majority . . . perfunctorily dismisse[d] it as a 'constitutional anomaly.' " *Id.* at 1615-16 (Blackmun, J., dissenting).

[60] *See id.* at 1600. The Court stated that "if [the] prohibiti[on] [of] the exercise of religion . . . [was] not the object of the tax [or religiously neutral law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment [would] not [have] been offended." *Id. Compare* Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1989) (upholding application of antitrust laws as applied to press) *with* Grosjean v. American Press Co., 297 U.S. 233, 250-51 (1936) (striking down license tax applied only to newspapers with weekly circulation above specified level).

ling state interest" balancing test,[61] the Court restricted its application to two instances: (1) cases involving the denial of unemployment compensation or other similar individual governmental assessment;[62] and (2) "hybrid" cases[63]—those involving free exercise claims in conjunction with the denial of other constitutional rights.[64]

The *Smith* Court's reason for applying a "generally applicable neutral law" standard was that the government's ability to enforce prohibitions against socially harmful conduct should not depend on weighing the effect of a general law against a religious objector's "spiritual development."[65] The Court further noted that even if the right to ignore generally applicable laws was limited to those situations in which the otherwise prohibited conduct is central to an objector's religion, this would result in judicially improper explorations into the centrality of beliefs and rituals within religious faiths.[66]

Although *Smith* addressed a criminal statute's infringement

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[61] *See supra* notes 30-39 and accompanying text.

[62] *See Smith*, 110 S. Ct. at 1602-04. The Court stated that aside from the denial of unemployment compensation claims, the *Sherbert* test had never been used to invalidate any governmental action taken to achieve a compelling state interest. *See id.* at 1602. The Court cited Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1987), Thomas v. Review Bd., Indiana Employment Division 450 U.S. 707 (1981), and Sherbert v. Verner, 374 U.S. 398 (1963), as three occasions in which it had invalidated state unemployment compensation rules on the grounds that they conditioned the availability of benefits on "an applicant's willingness to work under conditions forbidden by his religion." *Id.* at 1602-04. Although the Court was noncommittal, it did suggest that the *Sherbert* analysis may also survive in similar situations involving "individualized governmental assessment[s]." *Id.* at 1603.

[63] *See* Record of Oral Argument on Appeal, *supra* note 53, at 14-15.

[64] *See Smith*, 110 S. Ct. at 1601. As an example, the Court examined the free exercise clause coupled with free speech and freedom of the press. *Id.*; *see also* Murdock v. Pennsylvania, 319 U.S. 105, 114 (1943) (flat license tax to solicit literature as applied to Jehovah's Witnesses impinged upon free exercise of press and religion).

[65] *Smith*, 110 S. Ct. at 1597, 1603. The *Smith* Court stressed that it did not want judges to have to value and weigh the centrality of conduct to individual religions. *Id.* at 1604. For this reason, the Court found it impractical to apply the *Sherbert* test to situations where litigants claim that the conduct prohibited is central to their religion. *Id.* Noting that the people of this nation have diverse religious beliefs and practices, the Court held that it "cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Id.* at 1605 (emphasis in original). Based on this reasoning, the Court proposed that a generally applicable neutral law standard should be appled in situations similar to *Smith*. *Id.* at 1604.

[66] *See id.* at 1604.

upon the exercise of religion,[67] this "generally applicable" standard arguably could appear to reach all types of neutral, nondiscriminatory statutes that may infringe on the free exercise of religion.[68]

Therefore, in light of recent Supreme Court precedent, if a landmark statute can be characterized as a general, religion-neutral nondiscriminatory law, its effect on a religious institution would be judged under the *Smith* standard. However, it should be noted that this standard might prove inapplicable if the first amendment challenge is accompanied by a valid fifth amendment takings claim,[69] in which case a "compelling state interest" standard should be utilized.

II. GOVERNMENT TAKINGS UNDER THE FIFTH AMENDMENT

In addition to challenges under the first amendment free exercise clause, landmark preservation laws have also come in conflict with the fifth amendment takings clause, which guarantees that private property shall not be taken for public use without just compensation.[70] In order to resolve any fifth amendment conflict properly, the Court has viewed land use restrictions in light of the individual property in question.[71]

Although the Supreme Court has not directly addressed the constitutionality of the takings clause as applied to the landmarking of religious or charitable institutions,[72] it has examined this issue in a commercial context. In *Penn Central Transportation Co. v. New York City*,[73] a fifth amendment takings issue arose concerning Grand Central Terminal's designation as an historic landmark by the New York Landmark Commission in 1967.[74] As a result of

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[67] *See id.* at 1597.

[68] *See id.* at 1607 (O'Connor, J., concurring). Justice O'Connor suggested that although the law in question was a criminal statute, the effect of the *Smith* decision would be to apply this analysis to all generally applicable laws. *Id.* (O'Connor, J., concurring).

[69] *See supra* notes 63-64 and accompanying text.

[70] *See supra* note 4. The takings clause is applicable to the states through the fourteenth amendment. *See* Chicago B. & Q. R. v. Chicago, 166 U.S. 226, 241 (1897).

[71] *See, e.g.*, Agins v. Tiburon, 447 U.S. 255, 260 (1980) (general zoning law must be applied to particular property at issue to determine whether unconstitutional taking resulted); Nectow v. City of Cambridge, 277 U.S. 183, 185-87 (1928) (constitutional effect of zoning ordinance must be examined in light of land in question).

[72] *See* Note, *Historic Preservation Ordinances*, 63 N.C.L. REV. 404, 418 (1985) (Supreme Court has never addressed takings issue arising from land use regulation of church property).

[73] 438 U.S. 104 (1978).

[74] *See id.* at 115-16. The Commission's report stated that the Grand Central Terminal

such a designation, Penn Central Transportation Co. ("Penn Central") became responsible for maintaining the building in good repair and receiving approval from the Landmark Commission before making any alterations.[75] A controversy arose, however, when the Commission refused to allow Penn Central to construct a fifty-five-story office building above the terminal.[76] In justifying its decision, the Commission argued that the new building would clash with the terminal's Beaux-Arts facade.[77] In upholding the constitutionality of the New York Landmark Preservation statute, the *Penn Central* Court found that New York City's objective in preserving its special historic, cultural, and architectural structures to be a legitimate governmental undertaking.[78] In addition, unlike spot zoning,[79] the Court viewed the landmark law as a generally applicable and nondiscriminatory law.[80]

"evoke[d] a spirit that is unique in . . . [New York City]" and that its architecture "represent[ed] the best of the French Beaux Arts." *Id.* at 116 n.16.

[75] *See supra* notes 14-16 (describing owner's duty under New York City landmark statute). *See generally* Comment, *supra* note 49, at 119-24 (overview of New York Landmark Preservation Law).

[76] *See Penn Central*, 438 U.S. at 116-19. In 1968, Penn Central "entered into a renewable 50 year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of United General Properties, Ltd. . . . [wherein] UGP was to construct a multistory office building above the Terminal." *Id.* at 116.

[77] *See id.* at 117-18. The Commission stated that while there was no rule against making alteration to structures designated as landmarks, the proposal to construct an office tower above the Terminal "seems nothing more that an aesthetic joke [because] . . . the tower would overwhelm the Terminal by its sheer mass . . . and would reduce the Landmark itself to the status of a curiosity." *Id.* at 118.

[78] *See id.* at 129. The Supreme Court has acknowledged the power of states and municipalities to regulate land use to preserve the character and special quality of a community. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (Court upheld local economic regulation aimed at increasing number of visitors to tourist attraction); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (Court upheld zoning ordinance restricting land use to one-family dwellings); Berman v. Parker, 348 U.S. 26, 36 (1954) (Court upheld redevelopment act aimed at eliminating substandard housing conditions).

[79] *See Penn Central*, 438 U.S. at 132. The Court defined "reverse spot" zoning as "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." *Id. See generally* Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 9-44 (1988) (analyzing discriminatory land regulation).

[80] *See Penn Central*, 438 U.S. at 132. In *Penn Central*, New York City's Landmark Preservation Law was viewed as a comprehensive plan to preserve the buildings of aesthetic interest in the city. *Id.* As the Court noted, at the time of the decision, there were over four hundred landmarks and thirty-one historic districts represented under the plan. *Id.* However, the appellants argued that the landmark statute was discriminatory because of its impact on designated landowners. *Id.* at 132-33. While the Court conceded that the law had greater impact on certain landowners, it emphasized that "[this] in itself does not mean that the law effects a 'taking.' " *Id.* at 133. The Court advanced three reasons for justifying its

In determining whether a taking had occurred, the *Penn Central* Court identified three significant factors: (1) the character of the governmental action; (2) the extent to which the governmental action interfered with the claimant's "investment backed expectations"; and (3) the economic impact of the governmental action on the claimant.[81] In weighing "the character of the governmental action," the Court explained that a greater possibility of a taking exists when the government has physically invaded the property.[82] In analyzing the extent to which the governmental action interfered with the claimant's "investment backed expectations," the Court appeared to imply that no reasonable expectations will be found to exist where the governmental action was foreseeable.[83] In resolving the "economic impact of the governmental action" factor, the *Penn Central* Court determined that a taking does not depend upon how much the landmark statute diminishes the value of the designated property, but rather upon whether the property is still suitable for an economically viable purpose after the landmark designation.[84]

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decision: first, the Court reasoned that "[l]egislation designed to promote the general welfare commonly burdens some more than others." *Id.* Second, the Court compared the Landmark Preservation statute to zoning laws by recognizing zoning laws as valid exercises of legislative authority, despite the disparate impact of such laws' upon selected parties. *Id.* at 134. Last, the Court stated that although the appellant had been burdened by the landmark designation, designated landowners also benefit in that the Commission's act had the effect of "improving the quality of life in the city as a whole." *Id.*

[81] *Id.* at 124; *see* Peterson, *Land Use Regulatory Takings Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 339-52 (1988) (analysis of three factors discussed in *Penn Central*).

[82] *See Penn Central*, 438 U.S. at 124. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . , than when interference arises from some public program adjusting the benefits and burdens of economic life . . . ." *Id.*; *see, e.g.*, Hodel v. Irving, 481 U.S. 704, 717-18 (1987) (statute prohibiting devise of certain types of land to one's heirs constituted taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (physical occupation of private property constitutes taking per se).

[83] *See, e.g.*, Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1986) (employers had sufficient notice of ERISA regulation and that "withdrawal itself might trigger additional financial obligations"); Ruckelshaus v. Monsanto & Co., 467 U.S. 986, 1006 (1984) (Monsanto aware of EPA's disclosure policy pursuant to statute). The Court in *Penn Central* examined the foreseeability of the effect of the landmark statute in light of the investment-backed expectations of Grand Central Terminal. *See Penn Central*, 438 U.S. at 125. The Court, in reaching its decision, reasoned that in the last fifty years, there has been an influx of landmark preservation measures in the United States. *Id.* at 107. This would imply that the Court believed the owners of Grand Central Terminal had sufficient notice that their property might be the subject of a landmark designation. *See id.*

[84] *See Penn Central*, 438 U.S. at 129-31, 138 n.36. The Court rejected the proposition

Upon applying these principles to the facts of *Penn Central*, the Court stressed that the landmark designation did not prohibit the continuation of the current use of the terminal[85] and that Penn Central was not deprived of the ability to realize a "reasonable return" on its investment without the erection of the office building.[86]

Although commentators[87] are in disagreement as to the specific test applicable in resolving "takings" claims, the Supreme Court has implied that the factors set forth[88] in *Penn Central* are applicable when a taking is premised on land use regulation rather than physical invasions.[89] However, the regulation in question must substantially advance a legitimate governmental interest and must not deny the owner of the economically viable use of his land.[90] In recent years, the Court has gone even further in restrict-

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that diminished property value alone is sufficient to constitute a "taking." *Id.* at 131. Further, the Court found that Penn Central could still "earn[] a reasonable return." *Id.* at 129. The Court also noted that its decision did not preclude Penn Central from receiving relief in the future if the circumstances demonstrated that, because of the restrictions, the present use of the terminal was no longer "economically viable." *Id.* at 138 n.36.

[85] *Id.* at 136.

[86] *Id.* at 136-38. The Court stated: "[W]e must regard the New York City law as pemitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment." *Id.* at 136. Of additional importance in the Court's analysis was that Penn Central could still generate excess income by selling the air rights above the terminal since such sale could be seen to "mitigate whatever financial burdens the law imposed on the appellants and, for that reason, [were] to be taken into account in considering the impact of regulation." *Id.* at 137. The Court also emphasized the fact that the Commission did not prohibit building above the terminal, but merely prohibited the construction of this particular office building. *Id.*

[87] *See* Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299, 1316-33 (1989) [hereinafter Peterson, *The Takings Clause*]. Professor Peterson noted that the Supreme Court has used four different methods of analysis in resolving "takings" issues: (1) the three-prong *Penn Central* test; (2) the two-part test of whether the regulation substantially advances a legitimate state interest and is economically viable; (3) the "no economically viable use" test; and (4) the *Loretto* per se rule. *Id.* at 1316; *see also* Peterson, *supra* note 81, at 339-56 (analyzing *Penn Central* factors and applying them to two-part test); Note, *Taking A Step Back: A Reconsideration of the Takings Test of* Nollan v. California Coastal Commission, 102 HARV. L. REV. 448, 449-65 (1988) (suggesting that cause-effect test is inefficient and unfair).

[88] *See* Peterson, *supra* note 81, at 340. The Supreme Court has implied that the relative weight assigned to the three *Penn Central* factors will vary depending on the facts of each case. *Id.*; *see, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-06 (1984) (interference with investment-backed expectations not dominant factor under facts presented).

[89] Agins v. City of Tiburon, 447 U.S. 255, 261 (1980).

[90] *See id.* at 260-61. The *Agins* Court noted that although no precise test exists, a taking has occurred when the legitimate state interest has not been advanced by the land regulation or when the land regulation acts to deny an owner the economically viable use of his

ing governmental rights to regulate or control private property[91] by requiring that in order for a government regulation to avoid being considered a taking, there must be a close relationship between the means chosen to restrict an owner's use of his land and the governmental interest sought to be advanced.[92] Previously, the Court had required only a minimal relationship.[93]

Although *Penn Central* was decided in a commercial, revenue generating context, its holding is not unrelated to takings claims involving religious or charitable institutions. In such a situation, the *Penn Central* test for economic viability could be modified to focus on whether the charitable or religious use of the property, as evidenced by past practice, could reasonably be expected to continue despite the landmark designation. Such a modification is justified because the purpose of a religious or charitable institution

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land. *Id.* at 260. This analysis requires weighing both public and private interests. *Id.* at 261; *Penn Central*, 438 U.S. at 127 ("use restriction on real property may constitute 'taking' if not reasonably necessary to the effectuation of a substantial public purpose").

It has been argued that different tests are to be applied when the statute is challenged as facially unconstitutional, or unconstitutional "as applied" to the particular claimant. *See* Peterson, *The Takings Clause*, *supra* note 87, at 1360-61. It appears, however, that the Supreme Court has applied *Agins* in cases involving a taking where a legitimate state interest was not being advanced by the land regulation and where the regulation acted to deny the owner the economically viable use of his land. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987). In *Nollan*, the Court relied on both *Penn Central* and *Agins* to determine that conditioning a public rebuilding permit on the private grant of an easement constituted a taking without just compensation. *Id.* at 838-42. This suggests that the three factors discussed in *Penn Central* should be analyzed in a way that is consistent with the *Agins* test. *See infra* notes 92-93.

[91] *See, e.g.*, *Nollan*, 483 U.S. at 837 (land use regulation must have close nexus regarding governmental means and ends); First Lutheran Church v. Los Angeles County, 482 U.S. 304, 319-22 (1987) (property owner can recover damages for period of unconstitutional taking between enactment and invalidation of regulation).

[92] *Nollan*, 483 U.S. at 837. The *Nollan* Court had to determine whether a California statute, which allowed the state to place restrictions on the rebuilding of existing single-family coastal houses, and which as applied, required the private owner to grant a public easement in return for permission to rebuild, resulted in a taking. *Id.* at 827-28. In determining whether a taking existed, the Court noted that the regulation must have a close fit between the condition substituted for the provision and the end advanced as the justification for the provision or the regulation would be deemed unconstitutional. *Id.* at 837. The Court determined that a taking resulted from the regulation because the required nexus between the means chosen and the ends advanced was lacking. *Id.* at 836-40.

[93] *Id.* at 842-47 (Brennan, J., dissenting). Justice Brennan argued that the court's strict nexus standard was inconsistent with prior precedent. *Id.* at 843. According to Justice Brennan, precedent required only that the state's exercise of its police power be rational. *Id.* (Brennan, J., dissenting). Thus, a land use regulation passes constitutional muster if the " 'State *could rationally have decided*' that the measure adopted might achieve the State's objective." *Id.* (Brennan, J., dissenting) (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)) (emphasis in *Clover Leaf*).

differs from a commercial institution's usual purpose of generating revenue.[94]

III. The Second Circuit's Constitutional Analysis in *St. Bartholomew's*

A. St. Bartholomew's Church v. City of New York

Recently, in *St. Bartholomew's Church v. City of New York*,[95] the United States Court of Appeals for the Second Circuit addressed with a challenge to the constitutionality of the New York City landmark preservation statute as it applied to St. Bartholomew's Church.[96] St. Bartholomew's Church was organized in 1835 as a not-for-profit religious corporation.[97] The structures housing this religious corporation consist of a house of worship, which was constructed in 1917 and an adjacent building, known as the Community House, which was completed in 1928.[98] The Community House is used for many of the social and religious activites in which St. Bartholomew's is engaged.[99] In 1967, the New York Landmark Commission designated both buildings landmarks.[100] Significantly such a designation prohibits the alteration, reconstruction, or demolition of any part of the designated building without the consent of the Commission.[101]

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[94] *See* Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 378, 288 N.Y.S.2d 314, 316 (1st Dep't 1968). In *Platt*, the New York Appellate Division, First Department stated that while an owner of commercial property seeks an adequate return on his property, a charitable institution has different expectations. *Id.* The *Platt* court went on to note that when examining a charitable institution, the test should be whether the regulation "physically or financially prevents or seriously interferes with carrying out the charitable purpose." *Id.*; *see* Comment, *supra* note 49, at 123-26 (New York courts apply modified standard for takings claims involving charitable institutions).

[95] 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 59 U.S.L.W. 3433 (March 4, 1991).

[96] *See id.* at 351-53; *infra* notes 116-26 and accompanying text.

[97] *See St. Bartholomew's*, 914 F.2d at 351.

[98] *Id.*

[99] *Id.* The Community House contained a preschool, theater, athletic facilities, meeting rooms, and other offices. *Id.* Meals were prepared for the homeless from a pantry located in the Community House. *Id.*

[100] *Id.* The Church did not object at the time of the designation. *Id.* The Commission commented that "St. Bartholomew's Church and Community House have a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural aspects of New York City." *Id.* Prominent features of the Church included its octagonal dome, large rose window, and polychromatic stone exterior. *Id.*

[101] *Id.*; *see* New York, N.Y., Admin. Code ch. 3, § 25-301(a)(1) (1986); *supra* notes 14-16 and accompanying text; *see also* Comment, *supra* note 49, at 120 (failure to maintain or

In December of 1983, the Church filed a certificate of appropriateness with the Commission for permission to demolish the Community House and build in its place a fifty-nine-story office building.[102] However, this request was denied.[103] In December of 1984, the Church again sought approval to demolish the Community House; this time with the stated purpose of erecting a forty-seven-story office building.[104] The Church was again unsuccessful.[105] Following this attempt, the Church tried to circumvent this denial through a procedure known as the "hardship exception,"[106] arguing that the Community House was no longer suitable for the Church's purposes.[107] Although St. Bartholomew's maintained that the new office tower would house many of the Church's programs and generate revenue critical to their survival,[108] the Commission refused its request on the ground that the Church failed to prove the necessary degree of hardship.[109]

In April of 1986, unsatisfied with the Commission's rulings, the Church sought declaratory relief on the grounds that the landmark preservation statute was unconstitutional on its face and

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repair subjects owner to criminal penalties under landmark law).

[102] *St. Bartholomew's*, 914 F.2d at 351; *see* NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-307 (1986). When an owner of a designated structure files a certificate of appropriateness, the Commission determines whether the proposed change is consistent with the landmark designation. *Id.* § 25-307(a). In deciding whether to grant permission to reconstruct, alter, or demolish, the emphasis is on how the proposed change will effect the exterior of the landmarked features and the features of neighboring structures. *Id.* § 25-307(b)(1).

[103] *St. Bartholomew's Church*, 914 F.2d at 351. The request was denied as an "inappropriate alteration." *Id.*

[104] *Id.*

[105] *Id.*

[106] NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-309(a)(2)(c) (1986). The "hardship exception" provides that a certificate of appropriateness shall be granted for a not-for-profit applicant if the applicant can show that such structure "has ceased to be adequate, suitable or appropriate for useful carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is not [sic] longer engaged in pursuing such purposes." *Id.*

[107] *See St. Bartholomew's*, 914 F.2d at 352.

[108] *See* Brief for Appellant, *supra* note 18, at 7-9. The Church argued that the amount of space in the Community House was unsuitable for their needs. *Id.* at 7. The Church further asserted that its ministry and charitable programs had been severely curtailed due to a lack of revenue. *Id.* at 8; *St. Bartholomew's*, 914 F.2d at 357.

[109] *See St. Bartholomew's*, 914 F.2d at 352. Before making its determination, the Commission held a series of public hearings in which they gathered evidence and testimony from numerous interested parties. *Id.* The data gathered included evidence of needed structural and mechanical repairs to the Church and Community House, as well as reports of the Church's financial condition. *Id.*

as applied to St. Bartholomew's Church.[110] In challenging the constitutionality of the statute and the Commission's ruling, the Church relied on two grounds. First, the Church maintained that the "Landmarks Law, facially and as applied to the Church, violate[d] . . . the free exercise [clause] . . . of the First Amendment."[111] Second, the Church alleged that the Commission's application of the statute constituted a taking of property without just compensation in violation of the fifth amendment takings clause.[112] The United States District Court for the Southern District of New York granted summary judgment against the Church on the facially unconstitutional claims[113] and after a bench trial, it denied the Church's as-applied-to claims[114] on the ground that the Church had failed to demonstrate that the Community House was inadequate for the Church's purposes or that the Church was unable to afford the necessary repairs.[115]

On appeal, the Church renewed its claims that the regulation violated the free exercise clause and resulted in an unconstitutional "taking."[116] However, the United States Court of Appeals for the Second Circuit affirmed, holding that the Landmark Preservation statute was not unconstitutional as applied to St. Barthol-

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[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] St. Bartholomew's Church v. City of New York, 728 F. Supp. 958, 962-63 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990). The district court rejected the Church's assertion that the statute abridged its first amendment right to free exercise of religion. *Id.* at 963. The court reasoned that the mere possibility that the Church may desire to use its property in a different manner placed nothing more than an incidental burden on religion. *Id.* The district court further explained that the Church would not be deprived of its right to try to alter the property in the future. *Id.* In addition, the court found that the landmark law did not infringe upon equal protection or procedural due process rights. *Id.* at 963-65. Thus, the district court granted summary judgment of St. Bartholomew's' claim that the statute was facially unconstitutional as to all churches. *Id.* at 965.

[114] *Id.* at 965-75. The free exercise as-applied-to claim was based on the denial of St. Bartholomew's' hardship application under the Landmark Preservation statute. *Id.* at 965. In addition, the Church argued that the denial of its application had the effect of stopping St. Bartholomew's from carrying out its religious purpose, and thus constituted a "taking" of its property without just compensation. *Id.*

[115] *Id.* at 966, 972. The district court stated that for any constitutional claim to prevail, there must be a finding that the Church could no longer carry out its charitable purpose. *Id.* at 966. The district court reviewed repair costs of the Community House and the financial condition of the Church and concluded that St. Bartholomew's had failed to establish by a preponderance of the evidence that it could not carry out its religious and charitable purposes in its existing facilities. *Id.* at 967-75.

[116] *St. Bartholomew's*, 914 F.2d at 350-51.

omew's Church.[117]

In addressing the free exercise issue, the Second Circuit stressed that the Supreme Court has indicated that government regulation "may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers."[118] Utilizing the Supreme Court's analysis in *Smith*,[119] the Second Circuit remarked on the "critical distinction . . . between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented."[120] Determining that the landmark law was a "facially neutral regulation of general applicability",[121] the *St. Bartholomew's* court concluded that although the law effectively restricted the Church's ability to generate funds, this standing alone did not implicate a free exercise violation.[122] In fact, according to the court, absent either discrimination against the Church's ability to practice religion or coercion regarding such practice or beliefs, the landmark law was not violative of the free exercise clause.[123]

In examining the "takings" claim, the Second Circuit applied the analysis set forth by the Supreme Court in *Penn Central*.[124] However, the court concluded that when applying the *Penn Central* test to a charitable organization, the central question should not be whether the property provides a reasonable return, but "whether the land-use regulation impairs the continued operation of the property in its originally expected use."[125] Under this modi-

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[117] *Id.* at 351.

[118] *Id.* at 354. The Second Circuit reasoned that although the government cannot coerce or punish individuals for their religious beliefs, it can limit some activities related to the practice of religion under its general police powers. *See id.*

[119] *See supra* notes 54-59 and accompanying text.

[120] *See St. Bartholomew's*, 914 F.2d at 354. The Second Circuit conceded that a law regulating religious beliefs, as opposed to conduct, would be an unconstitutional infringement on the free exercise of religion. *Id.*

[121] *Id.* The court relied on the Supreme Court's analysis in *Penn Central*. *Id.* at 355.

[122] *Id.* The Second Circuit relied in part on the Supreme Court's decision in Jimmy Swaggart Ministries v. Commissioner, 110 S. Ct. 688 (1990). *Id.*

[123] *Id.*; *see* Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1326 (1988) (incidental effects of government programs that do not result in coercing individuals to act against religious beliefs do not require state to prove compelling justification for regulatory action).

[124] *St. Bartholomew's*, 914 F.2d at 356-60; *see supra* notes 81-86 and accompanying text.

[125] *St. Bartholomew's*, 914 F.2d at 356. The Second Circuit took into account the *Penn Central* rationale that despite the landmark designation of Grand Central Terminal, its owner could still use the property as it had in the past, and more importantly, was still able to earn a reasonable return on its investment. *Id.*

fied analysis, the court conluded that the landmark law, as applied to St. Bartholomew's, did not result in an unlawful taking because, in the court's determination, the Church could continue its historical, religious, and charitable activities in the Community House as it presently existed.[126]

B. *The Second Circuit's Free Exercise Analysis in* St. Bartholomew's

In addressing the free exercise issue in *St. Bartholomew's*, it would appear that the Second Circuit correctly relied on the newer *Smith*[127] analysis rather than the more traditional "compelling state interest" test refined in *Sherbert*.[128] In *Smith*, the Supreme Court determined that the *Sherbert* analysis was limited either to free exercise cases within the unemployment compensation context involving individual governmental assessment[129] or to free exercise cases involving an independent constitutional concern.[130] As will be discussed below, St. Bartholomew's Church failed to raise a valid fifth amendment "takings" claim, and as a result, the Second Cir-

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[126] *Id.* The Second Circuit, in discussing the economic effect of the designation on St. Bartholomew's, recognized the distinction between a not-for-profit organization and a commercial one. *Id.* at 357. The Second Circuit also noted that although the Landmark Preservation statute may "freeze" the Community House in its current use, under the analysis in *Penn Central*, this is permissible even though St. Bartholomew's would effectively be prevented from expanding or altering its activities under the designation. *Id.* at 356. Thus, the Second Circuit seemed to focus on whether St. Bartholomew's could continue to use the property to house its charitable and religious programs in a manner consistent with past experience. *See id.* at 357. The Court of Appeals agreed with the district court's determination that the Church did not sufficiently prove that the Community House was insufficient for the needs of the Church. *Id.* at 357-58.

[127] *Smith*, 110 S. Ct. at 1595; *see supra* notes 54-69 and accompanying text.

[128] *Sherbert*, 374 U.S. at 398; *see supra* notes 30-37 and accompanying text.

[129] *See Smith*, 110 S. Ct. at 1603. The *Smith* Court suggested that the reason it applied the compelling state interest analysis in *Sherbert* was that the situation "lent itself to individualized governmental assessments of the reasons for the relevant conduct." *Id.* The *Smith* Court hinted that under similar circumstances, the *Sherbert* test might again be used. *Id.* The Court, however, was not clear as to what would fall under this similar criteria. *See id.*

[130] *Smith*, 110 S. Ct. at 1601. The *Smith* Court explained that an exception to the generally applicable standard exists when the first amendment concern is considered in conjunction with another constitutional claim, for example, the right of parents to direct the education of their children. *Id.* In support of this position, the Court cited Wisconsin v. Yoder, 406 U.S. 205, 233 (1972), which clearly relied on the *Sherbert* "compelling state interest" test. *Smith*, 110 S. Ct. at 1601 n.1. Thus, in such "hybrid matters," the Court seems to have conceded that the proper analysis would be to apply a substantial burden/compelling state interest test. *Id.* at 1601.

cuit's application of *Smith* was correct.[131]

Under *Smith*, the "right to free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[132] Under this view, if New York's landmark statute is defined as a law of general applicability that is valid and nondiscriminatory, it would not constitute an unconstitutional infringement on the free exercise of religion.[133] Relying on the Supreme Court's language in *Penn Central*, the Second Circuit determined that New York's landmark law was in fact general, neutral, and nondiscriminatory.[134] Based on this determination, the Second Circuit concluded that, notwithstanding the restriction placed on the Church, which prohibited the erection of an office building in place of the Church's Community House, New York's landmark statute did not violate the free exercise clause.[135]

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[131] *See infra* notes 136-44 and accompanying text.

[132] *See Smith*, 110 S. Ct. at 1600. The *Smith* Court reasoned that to excuse a person's violation of the law, based on the free exercise of religion, would permit religious practices to be "superior to the law of the land and in effect to permit every citizen to become a law unto himself." *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1878)).

[133] *Id.*

[134] *St. Bartholomew's*, 914 F.2d at 355; *see Penn Central*, 438 U.S. at 132-34 (Court concluded that New York Landmark Preservation statute was general, comprehensive, nondiscriminatory plan repesenting legitimate state objective).

[135] *St. Bartholomew's*, 914 F.2d at 355-56. In a decision prior to *Smith*, one court applied the "compelling state interest" test to strike down a landmark statute. *See* First Covenant Church v. City of Seattle, 114 Wash. 2d 392, 401-10, 787 P.2d 1352, 1356-61 (1990) (en banc). In *First Covenant*, the Supreme Court of Washington was faced with a free exercise challenge to Seattle's Landmark Preservation statute. *Id.* at 394-95, 787 P.2d at 1353. Using the *Sherbert* analysis, the *First Covenant* court found that the statute was unconstitutional as applied to religious structures, since the statute placed a substantial burden on the free exercise of religion and did not promote a compelling state interest. *Id.* at 405-10, 787 P.2d at 1359-61.

Justice Utter, concurring, noted that in light of *Swaggart*, handed down after *First Covenant* was argued, the emphasis should have been on whether the substantial burden on the exercise of religion was met by the severe diminuition of appraisal value resulting from the landmarking. *Id.* at 412-14, 787 P.2d at 1363-64 (Utter, J., concurring).

It is submitted that the reasoning under *First Covenant* is inappropriate to the facts of *St. Bartholomew's* for several reasons. First, in light of *Smith*, the *Sherbert* analysis is arguably no longer applicable to landmark preservation cases involving religious structures. *See supra* notes 127-32 and accompanying text (discussion of *Smith* and *Sherbert*). Also, under *Swaggart*, it appears that the free exercise of religion is not violated by a generally applicable law, the sole effect of which is financial burden. In *St. Bartholomew's*, there was no evidence that the market value of the church had any effect on the church's ability to carry out its religious mission, and therefore no "substantial" burden was found. Lastly, even if a substantial burden had been found, landmark preservation appears to be a compel-

C. *The Second Circuit's Takings Analysis in* St. Bartholomew's

A regulation dealing with land use does not constitute an unconstitutional taking if it substantially advances a legitimate governmental interest and does not deny the owner economically viable use of his land.[136] However, whenever such regulation is attempted, there must be a tight fit between the means chosen by the government and the objective being promoted.[137] To assess properly whether a regulation constitutes a taking, the three factors enunciated by the Supreme Court in *Penn Central* must be applied: (1) the character of the government action; (2) the extent to which the government action interferes with the claimant's investment backed expectations; and (3) the economic impact of the government action on the claimant.[138] It is important to note that the Second Circuit in *St. Bartholomew's* placed importance upon the *Penn Central* Court's finding that the New York landmarks statute is nondiscriminatory and part of a comprehensive plan to promote government's interest in preserving historical structures.[139] Further, the Second Circuit, relying on language from *Penn Central*, determined that New York's landmark law did not interfere with St. Bartholomew's historical expectations of the property's use,[140] in that the existing buildings were deemed sufficient to maintain the religious and charitable programs they housed in the past.[141] Additionally, the Second Circuit properly modified the economic impact factor to account for the differences between a nonprofit charitable organization and a commercial enterprise.[142] In fact, New York state courts have developed a "takings" standard for charitable organizations that examines whether the landmark designation of the property owned by the charitable organization prevents or seriously interferes with the accomplishment of the institution's charitable purpose.[143] For the institution

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ling state interest under *Penn Central* and suitably tailored under *Nollan*.

[136] Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980).

[137] Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

[138] *Penn Central*, 438 U.S. at 124.

[139] *See St. Bartholomew's*, 914 F.2d at 354; *see also Penn Central*, 438 U.S. at 132.

[140] *St. Bartholomew's*, 914 F.2d at 356. The Second Circuit found that St. Bartholomew's could continue its existing charitable pursuits in the Community House as it existed. *Id.*

[141] *Id.* at 357.

[142] *See id.*

[143] Society for Ethical Culture v. Spratt, 51 N.Y.2d 449, 454-55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980) (reasonable return standard adapted to charitable organiza-

to prevail under this standard, it must prove that it can no longer carry out its charitable mission in its existing facilities.[144] Finally, in accordance with prior Supreme Court case law,[145] a substantial nexus existed between New York's landmark statute, as the means chosen, and the preservation of New York City's historical and architectural culture, as the government's end.[146] Therefore, the Second Circuit was correct in its analysis of *St. Bartholomew's* fifth amendment takings claim.

CONCLUSION

Landmark preservation statutes are aimed at achieving the important government objective of maintaining the historical, aesthetic, and cultural atmosphere of a community. However, such statutes often raise constitutional questions under the fifth amendment takings clause in that they restrict the use and enjoyment of privately owned property. This problem takes on even greater constitutional significance when the restricted owners are religious institutions due to the first amendment free exercise clause.

Although the Supreme Court has not addressed the constitutional ramifications of landmarking religious structures, recent decisions by the Court suggest that if a landmark preservation statute is religiously neutral and generally applicable, it will not constitute a violation of the first amendment free exercise clause. Furthermore, while the Court does not currently have a black letter test to determine when the regulation of land use constitutes a governmental taking, the proper analysis appears to be the application of a balancing test that weighs the effect of the regulation on the property owner against the governmental interest being promoted.

Based on the constitutional guidelines established by the Supreme Court, it would appear that in *St. Bartholomew's*, the Second Circuit correctly determined that the New York landmark

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tions to permit landmark preservation so long as designation does not seriously interfere with charitable purpose); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d. 7, 16 (1974) (applying charitable purpose standard to owners of brownstone housing charitable organization).

[144] *See supra* note 141 and accompanying text.

[145] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 837 (1987) (close nexus required). A close nexus existed between the ends sought, the preservation of historical and architectural culture and the means chosen, the landmark preservation statute. *Id.*

[146] *See St. Bartholomew's*, 914 F.2d at 354-55.

preservation statute did not result in an unconstitutional taking or infringement upon the right of St. Bartholomew's Church to the free exercise of religion.

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